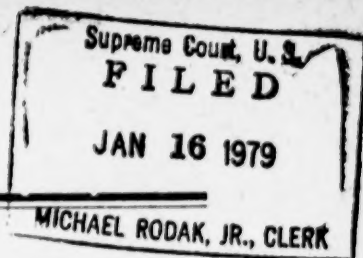


No. 78-852



In the Supreme Court of the United States
OCTOBER TERM, 1978

BURTON A. LIBRACH, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS
IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Petitioner was convicted in 1975 of filing a false claim to obtain money from the government, in violation of 18 U.S.C. 1001. *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975); 536 F.2d 1228 (8th Cir. 1976). He filed a request under the Freedom of Information Act, 5 U.S.C. 552, seeking copies of documents that could be used in support of a motion for a new trial. Three separate files concerning petitioner were located within the Depart-

ment of Justice: an FBI file, the Department file (i.e., the U.S. Attorney's records), and a file from the U.S. Marshals Service. The first two were disclosed to petitioner with only minor deletions, and the third was disclosed in substantial part.

Petitioner filed suit challenging the deletions. After inspecting the affidavits *in camera*, the district court upheld the government's claims of exemption from mandatory disclosure on September 13, 1978 (Pet. App. B-1). The court of appeals vacated the order and remanded the case on October 19, 1978, with instructions that the district court file a detailed opinion indicating the exemption relied upon and the reasoning used for each of the deletions made by the government (Pet. App. H-1 to H-5). On October 27, 1978, the district court filed an opinion describing in detail each of the claims of exemption it had upheld (Pet. App. I-1 to I-8). Petitioner then sought mandamus from the court of appeals, asserting that the district court had not complied with the court of appeals' mandate. The court of appeals denied the petition in an opinion upholding each of the district court's findings on remand (Pet. App. A-1 to A-3).¹

2. The petition seeking review of the court of appeals' denial of mandamus presents no issue of general importance. The deletions made in the FBI

¹ The appeal, remand, and petition for mandamus proceeded on an expedited basis, since petitioner was under a deadline for filing his motion for a new trial in his criminal case. That motion was filed on November 6, 1978, and was denied on December 20, 1978. *United States v. Librach*, No. 74-199 CR (3) (E.D. Mo.).

file consist entirely of the names of three types of persons: FBI agents who worked on the case, confidential informants, and persons mentioned in the file but never indicted or tried. In affidavits (Pet. App. C-1 to D-4) an FBI official explained that the agents' names were withheld on privacy grounds, under 5 U.S.C. 552(b)(7)(C), because disclosure would expose the agents to harassment by persons who may hold grudges against them. The same exemption was cited in support of withholding the names of unindicted persons identified in the file, to avoid creating the public impression that those persons were once suspected of criminal activity. Confidential informants are protected by 5 U.S.C. 552(b)(7)(D). These claims were fully supported by detailed public affidavits and were entirely proper. The court below thus was correct in upholding the claims.

Although deletions in the other two files (those of the Department of Justice and the Marshals Service) were not supported by detailed affidavits, the courts below nevertheless were correct in upholding the claims of exemption. The district court's opinion on remand presents petitioner with a more than adequate specification of the exemptions claimed for each deleted portion of these two files (Pet. App. I-4 to I-8). The following items were deleted from the Department of Justice file: a medical report that the district court ordered be disclosed and which, to our knowledge, was disclosed; handwritten notes on grand jury testimony, which were withheld under 5 U.S.C. 552(b)(3) and Fed. R. Crim. P. 6(e);

names of persons not indicted or tried, which were withheld for the same reason as names in the FBI file; and a tax return withheld under 5 U.S.C. 552 (b) (3) and 26 U.S.C. 6103. The materials withheld from the Marshals Service file all concern the procedures used to place Robert Fowler, the chief witness against petitioner at his criminal trial, in the Witness Security Program. Fowler was given protective custody and a new identity after threats were made against his life. Details of his participation in the program were withheld to protect Fowler and to protect the Witness Security Program. All of these claims of exemption were fully described by the district court. Petitioner is thus fully aware of the basis claimed for exemption of each item that has been withheld and was fully able to challenge each holding.

3. Petitioner presents several other arguments, each of which is insubstantial. First, he complains that there are other documents in the Department of Justice file that have not been identified, but the district court found to the contrary in August. Petitioner did not then and has not now made specific charges that any heretofore unidentified documents in this file might exist, and the government has denied that they do exist.

Second, although the FOIA exemptions do not justify withholding material that must be disclosed under the Jencks Act, 18 U.S.C. 3500, and *Brady v. Maryland*, 373 U.S. 83 (1963), it does not follow, as petitioner argues (Pet. 15-16), that the FOIA is the

proper vehicle for obtaining Jencks Act and *Brady* material. The district court, responding to a motion for a new trial, might order disclosure of any such material that exists, but the court in an FOIA case has neither the jurisdiction nor the familiarity with petitioner's criminal case to order disclosure under *Brady* or the Jencks Act.²

Finally, the government did not waive its claims of exemption by failing to plead them as affirmative defenses in its answer. The government pleaded its defenses in the most complete form possible at the time of the answer, by stating that it had not yet located the requested records or reviewed them to determine which exemptions, if any, would be claimed. As soon as specific claims of exemption were decided on, the government notified petitioner. At no time was petitioner misled or surprised to learn that claims of exemption would be made.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

² Although the district court denied petitioner's motion for a new trial (see note 1, *supra*), petitioner may raise any properly preserved claim of error on appeal. It is not clear from the materials in this case whether petitioner sought disclosure pursuant to his new trial motion.